NGOOI KIM CHONG

v.

SUBRAMANIAM MARUTHAN & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. P 616 OF 1984]
20 DECEMBER 1989

TORT: *Damages - Accident between motorcyclist (plaintiff) and motorist (defendant) - Sketch plan - Whether to consider evidence in isolation - Question of negligence - Fracture of tibia and fibula - Fracture of lower end of right radius and ulna - Compression fracture of the thoracic spine - Assessment of damages - Pain, suffering and loss of amenities - Loss of actual pre-trial earnings - Loss of future earnings - Loss of earning capacity.*

This action was instituted by the plaintiff to claim damages against the defendant in respect of the injuries sustained by the plaintiff as a result of an accident.

The evidence of PW2 (the investigating officer) and the contents of the sketch plan clearly substantiated the version of the plaintiff.

No evidence was given by the defendants; neither did they call any witness nor did they produce any documentary evidence except a report purportedly lodged by the 1st defendant on the day of the accident.

In assessing damages, the Court had to note the injuries sustained by the plaintiff:

(1) Fracture of the right tibia and fibula

(2) Fracture of the left tibia and fibula

(3) Fracture of the lower end of the right radius and ulna

(4) Compression fracture of the thoracic spine. The condition of the plaintiff, as explained by the consultant surgeon was:

(a) the plaintiff walked with a limp and with a "bow legged appearance" - more on the left lower leg,

(b) he was only able to squat down with the lower leg turned outwards i.e., he was unable to squat down if the knees were close to each other,

(c) the upper spine showed a slight bony prominence over the thoracic 4 and 5 vertebrae,

(d) the fracture of right radius and ulna had united although there was some stiffness of movement of the wrist and a shortening of the right forearm by a quarter inch,

(e) the fracture of the right tibia and left tibia had united but there was a marked bending at the site of the fracture of the left tibia resulting in a noticeable bowed appearance of the left lower limb,

(f) there was a shortening of the right lower limb by 2/3 of an inch. The lower left limb was also shortened by ½ an inch,

(g) the fracture on both fibulas had united. The fracture of the thoracic spine (T4-T5) too was united.

The Court awarded the plaintiff the following:

General Damages
Pain and suffering and loss of amenities - RM49,400
Loss of actual pre-trial earnings - RM26,400
Loss of future earnings - nil
Loss of earning capacity - nil

Special Damages
Agreed - RM338
As to the general damages the Court allowed interest at the rate of 8% p.a. from the date of service of the writ to the date of judgment.

An interest rate of 4% p.a. from the date of accident to the date of the trial in respect of the agreed special damages was allowed.

Held:
[1] It is highly improper for the Court to consider the evidence in isolation; it must consider the totality of the evidence before it can arrive at a fair and just decision.

[2] The first defendant was wholly to be blamed, as the accident was caused solely by his negligence.

[3] The plaintiff is not entitled to claim for loss of earning capacity.

[Order accordingly.]

Cases referred to:
Teh Leong Chew v. R [1947] MLJ 71
Bak Bee Choe & Anor. v. Sgt. Leon Colin Anesbury [1987] 2 MLJ xxi
Chan Sok Seng v. Jong Thian Luke [1984] 1 MLJ lxxi
Ngooi Ku Siong & Anor. v. Aidi Abdullah [1984] 1 CLJ (Rep) 294
Chhe Geok Yong & Anor. v. Ong Boo Ngee [1988] 2 MLJ xxvi
Yang Yap Fong & Anor. v. Leong Pek Hoon & Anor. [1987] CLJ (Rep) 419

For the plaintiff - A. Krishnan; M/s. James Foong & Anad
For the defendants - Maninder Singh; M/s. Lawrence, Dhillion & Associates

JUDGMENT

Lim Beng Choon J:

This action was instituted by the plaintiff to claim damages against the defendant in respect of the injuries sustained by him as a result of an accident which took place at or near to the 13th m.s. Cheras/Serdang road at about 7.40 a.m. on 8 January 1983.

At the material time, the plaintiff was riding his motor cycle no. BAK 5077 ('the motor cycle') from Serdang to his place of work at Cheras. When he came near to the 13th m.s. he had to negotiate a right hand bend. As there was an ascending slope along that stretch of road, he could only proceed at a speed of 30 m.p.h. since he had to travel uphill. His motor cycle was about 6' away from the left edge of the road. While proceeding uphill he saw three female cyclists approaching him from the opposite direction. They were about 30 to 40 feet in front of him. They were cycling abreast and not single file along the right half of the road as one faces Cheras. The defendants' motor car driven by the first defendant was seen approaching from the opposite direction proceeding towards Serdang. The motor car was travelling at a very fast speed. In his attempt to overtake the three cyclists, the first defendant

thereupon encroached on to the plaintiff's path and knocked against the plaintiff's motor cycle. The plaintiff said he could not avoid the collision as the motor car was 'coming very fast'. In any event he could not go too far to his left as there was a drain on the left side of the road. As a result of the collision the plaintiff said that his motor cycle fell on to his side of the road. He too hit the road and lost consciousness. He regained consciousness after his admission in the hospital. Under cross examination, he reiterated that the motor car came towards him at a very fast speed. He persisted in saying that as the motor car had suddenly encroached on his side he had no time to swerve to his left to avoid the collision.

The second witness for the plaintiff was a retired sergeant who at the time of the accident was the officer responsible for the investigation of the accident. He produced a sketch plan of the scene of the accident drawn by him. From the sketch plan one can see that:

(1) the motor cycle was lying on the left half of the road as one faces Cheras.

(2) the motor car was almost on the sidetable of the left half of the road and it was facing towards Serdang.

(3) glass splinters were scattered along the left half of the road near to the spot where the motor cycle was lying. The area over which the glass splinters were scattered was marked with the letters 'O' and 'F'.

(4) fragments of tinted glass splinters which according to PW2, came from the defendants' motor car were scattered near to the place where blood spots were found.

PW2 said that he measured the distance between the place where the glass splinters were found (marked with the letter F) and the edge of the left half of the road (marked with the letter 'B'). The distance was 5' 10". The distance from the spot where the tinted glass splinters were found to the said edge of the road was 4' 0". The distance from place where the blood spots were seen to the said edge of the road was 4' 6". From the key to the sketch plan the width of the road was 19' 5". The left half of the road as one faces Cheras was therefore about 9' 8 ½".

The evidence of PW2 and the contents of the sketch plan clearly substantiates the version of the plaintiff (see *Teh Leong Chew v. R* [1947] MLJ 71) that the accident was caused by the driver of the motor car who had encroached on to the wrong side of the road.

No evidence was given by the defendants; neither did they call any witness nor produced any documentary evidence except a report purportedly lodged by the first defendant at 3.50 p.m. on the day of the accident at the Cheras Police Station. It was included in the bundle of agreed documents. As the first defendant chose not to give evidence, the said report, even if admissible, is not sufficient to rebut the case for the plaintiff.

The learned Counsel for the defence in his submission drew my attention to the sketch plan and pointed out to me that the area over which the glass splinters were scattered was marked with the letter 'O' depicting the outer boundary of the said area facing the right edge of the road (marked 'A') as one faces Cheras and the letter 'F' depicting the inner boundary facing the left edge of the road (marked 'B'). Since PW2 had failed to take the measurement of the distance between point 'O' and point 'A', it was proper for the Court to draw the inference that the accident must have occurred at the centre of the road. Liability therefore should be apportioned in the ratio of 50-50. Needless to say that a suggestion is best said and be rejected. It is highly improper for the Court to consider the evidence in isolation; it must consider the totality of the evidence before it can arrive at a fair and just decision.

For the reason stated above, my finding is that the first defendant is wholly to be blamed. The accident was caused solely by his negligence. The question of contributory negligence does not arise in the present case.

Special damages under items (a) to (d) of p. 5 of the statement of claim have been agreed by the parties in the sum of RM338. The remaining items of damages are to be assessed under the following heads:

(i) Pain, suffering and loss of amenities.

(ii) Loss of actual pre-trial earnings.

(iii) Loss of future earnings.

(iv) Loss of earning capacity.

In assessing the damages under head (i), it is to be noted that the injuries sustained by the plaintiff were:

(1) Fracture of the right tibia and fibula

(2) Fracture of the left tibia and fibula

(3) Fracture of the lower end of the right radius and ulna.

(4) Compression fracture of the thoracic spine T4-T5.

The consultant surgeon who examined the plaintiff submitted a report dated 20 February 1984. The condition of the plaintiff was described thus:

(a) the plaintiff walked with a limp and with a "bow legged appearance" - more on the left lower leg,

(b) he was only able to squat down with the lower leg turned outwards i.e., he was unable to squat down if the knees were closed to each other,

(c) the upper spine showed a slight bony prominence over the thoracic 4 and 5 vertebrae,

(d) the fracture of right radius and ulna had united although there was some stiffness of movement of the wrist and a shortening of the right forearm by a quarter inch,

(e) the fracture of the right tibia and left tibia had united but there was a marked bending at the site of the fracture of the left tibia resulting in a noticeable bowed appearance of the left lower limb,

(f) there was a shortening of the right lower limb by 2/3 of an inch. The lower left limb was also shortened by ½ an inch,

(g) the fracture on both fibulas had united. The fracture of the thoracic spine (T4-T5) too was united.

The consultant surgeon opined that the plaintiff was able to use the left upper limb and the stiffness at the wrist would disappear with use. Because of the deformity of the bow legged appearance at the side of the fracture of his lower left limb early osteoarthritic changes were likely to occur. He also expected similar changes in the thoracic spine at the side of the fracture. The shortening of both the lower limbs would be permanent. The plaintiff was said to be unable to work permanently on ladders or uneven ground for long periods.

For the purpose of consistent comparison with authorities of past awards by the Courts I shall deal with the fracture of the right and left tibia and fibula first. The conventional sum in respect of a fracture of the tibia and fibula of a lower limb with a resulting ½ an inch shortening appears to me to be between RM12,000 to RM14,000 (see *Bak Bee Choe & Anor. v. Sgt. Leon Colin Anesbury* [1987] 2 MLJ xxi and *Chan Sok Seng v. Jong Thian Luke* [1984] 1 MLJ lxxi. According to the Counsel for the plaintiff, since in the present case the plaintiff suffered fracture of both the right and left tibia and fibula with the resulting shortening of ½ inch of the left leg and 2/3 inch of the right leg the proper award should be RM15,000 for the left leg injury and RM18,000 for the right leg injury. The Counsel for the defendant on the other hand suggested (if I understand him correctly) that since both the legs had been shortened one by ½ inch and the other 2/3 inch respectively, the two shortenings 'even up by themselves' and the result would be an almost zero shortening of the two lower limbs. He therefore suggested a sum of RM16,000 for the two fractures and an additional sum of RM2,000 to compensate for the slight shortening. While I agree that there should be a discount for overlapping, I do not think the 'even up' suggestion of Counsel can be accepted. I cannot ignore that there are two uneven shortenings and as result of these uneven shortenings the plaintiff could only walk with a limp and with a "bow legged appearance". In my assessment for the two fractures with the resulting shortenings I think a sum of RM28,000 is fair.

As regards to the fracture of the right radius and ulna with the resulting shortening of the right forearm by ¼ inch, Counsel for the plaintiff referred me to the case of *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1984] 1 CLJ (Rep) 294 where our Federal Court approved the award of RM15,000 for such fracture. But in that case plaintiff's arm was not shortened. Counsel therefore suggested an additional RM3,000 for the resulting shortening in the present case. From my reading the medical report, I do not think the ¼ inch shortening would in any way affect the use of his right arm; neither could such shortening be noticeable. I therefore assess the award for this injury in the sum of RM15,000.

Finally for the thoracic spine injury, Counsel for the plaintiff relied on the case of *Chhe Geok Yong & Anor. v. Ong Boo Ngee* [1988] 2 MLJ xxvi where a sum of RM10,000 was given. However in that case the plaintiff had some amount of cervical spondylosis prior to the accident and the accident itself aggravated her symptom. It was found that it was unlikely that she would be completely symptom free in the future. In the present case there is no sign of any residual impairment resulting from the thoracic spine injury except that there is a probability of osteoarthritic changes occurring in the future. In the circumstances my assessment for his injury is RM9,000.

The total award for pain and suffering and loss of amenities stands at RM52,000 out of which I will deduct a sum of RM2,600 for overlapping leaving a sum of RM49,000 as the final figure as an award under this head of damages.

Turning to the claim for loss of actual pre-trial earnings, the plaintiff was a subcontractor for painting works of buildings. He himself also carried out the painting works. He had ten employees to help him but he had to supervise them. He claimed that after the accident both his legs and hand were put in plaster of paris ('p.o.p.') for some 5 to 6 months. Even after the removal of the p.o.p. he was unable to walk without the use of crutches. He could only return to work some 16 months after the removal of the p.o.p. His evidence is corroborated to a certain degree by the following entries in the medical report: (see p. 1 of the agreed bundle of documents).

> Closed manipulative reduction and full length plaster of paris applied for both legs. Closed manipulated reduction and full length plaster of paris applied for (rt) arm. On the last follow-up on 26 May 1983 showed that the fracture has not united.

From the evidence I am satisfied that the plaintiff was totally incapacitated for a period of 5 months. Thereafter he was able to walk with crutches. The period of the partial incapacity would have lasted for another 6 or 7 months. I therefore hold that he was only able to resume his work as a subcontractor and painter one year after the date of the accident. Now it was said that since he had not produced any income tax returns of assessments or any account books to show what his income was prior to the accident his claim under this head should be rejected. It was also said that even if he had been incapacitated his workmen could still carry his subcontract works. I cannot accept both the contentions. In his police report dated 10 January 1983 he gave his occupation as "painter". That in my view confirms his evidence relating to his trade. That being so I do not think that the monthly earning as claimed by him in the sum of RM1500 p.m. is unreasonable considering that he had the capacity to employ 10 workmen. As to the second contention the plaintiff had said in his evidence (which I accept) that when he was incapacitated no builders would give him any painting works since they could not be sure that he could carry out the works. His assertion on this point is not incredible since time is the essence in most building contracts. In the circumstances of this case my assessment of the loss of actual pre-trial earnings is as follows:

(a) as the plaintiff was unable to resume his trade for 12 months he must have suffered a loss of 12 x RM1500 = RM18,000,

(b) thereafter the recovery of his full pre-accident income would take some time. I accept the plaintiff's assertion that when he resumed his work he was only able to earn between RM600 to RM800 a month. I therefore hold that he also suffered a loss of RM700 p.m. for a period of another one year. For this period of 12 months his loss will be 12 x 700 = RM8400.

The award under this second head is therefore RM26,400.

As regards to loss of future earnings, Counsel for the plaintiff appeared to have abandoned this claim as he chose to argue that the plaintiff was entitled to claim for loss of earning capacity. To my mind he rightly refrained from contending on this issue since the plaintiff has said that his present income is RM2000 per month. He is therefore earning more than what he was earning before the accident. There is no assessable loss at the date of the trial of this case.

As regards to the contention on the loss of earning capacity, our Federal Court has said in *Ngooi Ku Siong & Anor. v. Aidi Abdullah* (*supra*) that loss of earning capacity:

> arises where there is a residual risk that the plaintiff might be thrown out of work altogether at some future date. The risk must be real and not speculative or fanciful. Any loss of money is relevant, whether the money is properly described as "earnings"or not, provided that the money is more than a "mere possible contingency." Thus loss of possible contract as opposed to loss of probable contract is not recoverable.

Again in *Yang Yap Fong & Anor. v. Leong Pek Hoon & Anor.* [1987] CLJ (Rep) 419 at p. 422, our Federal Court reiterates the principle in this way:

> The proper test to be applied is whether some time in the future, due to the effect of the injuries sustained by him, the plaintiff will face a substantial risk of either losing his job or getting a less paid employment. It does not matter whether the plaintiff was in employment

or not at the time of the trial so long as the Court is satisfied from evidence that there is a real or substantial risk that his earning capacity will be effected in the future. *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All ER 9 and *Cook v. Consolidated Fisheries Ltd.* [1977] 1 CR 635, 639 are some of the cases in which a claim for loss or earning capacity was allowed to plaintiffs who were in employment and whose earnings were not affected at the material time.

Applying the principle advocated in the two authorities to the facts of the present case, I find that the plaintiff is now earning more than what he was able to earn prior to the accident. Although it is stated in the consultant surgeon's report of 1984 that the fractures of both lower portions of both legs may give rise to earlier osteoarthritic changes and that the plaintiff would be unable to work permanently on ladders or uneven ground for long period, the evidence does not support this prognosis. To be able to earn more than what he was earning before he met with the accident; the only logical conclusion that I can arrive at is that his physical and mental capacity has not deteriorated. He is still continuing to pursue the same trade from which he is able to get more money. There is also no evidence that there is a real or substantial risk that his present earning of RM2000 p.m. will be affected in the future. Likewise there was no evidence to show that there is any risk of future loss of any probable contract. In the circumstances, I am not convinced that the plaintiff is entitled to his claim for loss of earning capacity.

The awards given by me can now be summarised thus:

(1)	Special damages as agreed -	RM 338
(2)	Pain and suffering and loss of amenities -	RM49,400
(3)	Loss of actual pre-trial earnings -	RM26,400
(4)	Loss of future earnings -	nil.
(5)	Loss of earning capacity -	nil.
		RM76,138

In respect of the agreed special damages and the award for actual pre-trial earnings, I allow interest at the rate of 4% p.a. from the date of accident to the date of the trial. On the general damages I allow interest at the rate of 8% p.a. from date of service of writ to the date of judgment.

I should also mention that the plaintiff had claimed a sum of RM600 in respect of his motor cycle which he said in his pleadings was completely damaged and beyond repairs. In his evidence given at the trial he said that after the accident his motor cycle was taken by the police and he did not try to get it back. He did not give any reason as to why he did not try to get back the motor cycle from the police. Neither had he proved his allegation about the motor cycle having been damaged beyond repairs. I therefore reject his claim.

The plaintiff is entitled to the costs of this proceeding.

Also found at [1990] 1 CLJ 799